UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, Plaintiff,	:	**ECF CASE**
- v.-	:	05 Civ. 3941 (JSR)
UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	:	

DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE COURT'S AUGUST 29, 2005 ORDER

Defendant the United States Department of Defense ("DOD") respectfully submits this reply memorandum of law in further support of its motion for reconsideration of the Court's August 29, 2005 order (the "Order"). In response to DOD's motion, plaintiff Associated Press ("AP") simplistically asserts that the Order "does nothing more than seek the functional equivalent of a privacy waiver." Memorandum in Opposition to Defendant's Motion for Reconsideration ("AP Br.") at 5. Under Exemption 6 of the Freedom of Information Act ("FOIA"), however, courts are not authorized to require agencies to solicit privacy waivers from third parties, and certainly not in the unique and compelling circumstances of this case, where the third parties at issue are captured enemy combatants being detained by the U.S. military during wartime. DOD respectfully urges the Court to reconsider and vacate the Order, and to assess the applicability of Exemption 6 based on the agency declarations in the record.

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ARGUMENT

A. The Order Requiring Polling of Detainees Is Not Authorized By FOIA

AP fails to rebut the Government's argument that the Order is at odds with FOIA, which envisions that courts will assess the applicability of a particular exemption as a legal matter based on declarations submitted by the relevant agency. See Defendant's Memorandum of Law in Support of Its Motion for Reconsideration ("DOD Br.") at 4-5. AP's arguments that the views of third parties whose privacy interests are at stake can be considered in FOIA cases, see AP Br. at 3-4, and that individuals may waive their privacy interests protected by FOIA, id. at 4, are beside the point. In ordering DOD to conduct polling, the Court overlooked the distinction between an agency or a court considering a privacy waiver proffered by a FOIA requester or a third party and a court ordering the government to canvas the affected third parties as a precondition to performing the balancing inquiry required under Exemption 6. See DOD Br. at 3-8.[1]

FOIA provides no basis for the Court to impose a mandatory polling requirement, and the Court lacks authority to rewrite FOIA to include new procedures never sanctioned by Congress. See Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 145 (1981) (court must not "engraft[] onto the statutory language unique concepts of its own making"); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549 (1978) (courts should not "stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good").

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[1] AP's reliance on the procedures employed in Exemption 4 cases, AP Br. at 4, is misplaced. While, as AP points out, there are regulations requiring notification of third parties in cases involving confidential commercial information, no such regulations exist in the Exemption 6 context.

Indeed, absent statutory authority, such an order runs afoul of principles of sovereign immunity. See United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992) (waiver of sovereign immunity requires unequivocal expression of congressional intent); accord United States Envtl. Prot. Agency v. General Elec. Co., 197 F.3d 592, 597 (2d Cir. 1999), opinion amended on reh'g, 212 F.3d 689 (2d Cir. 2000).[2] AP does not refute DOD's showing that the cases on which the Court relied in issuing the polling directive, see Order at 4 n.1, do not support the use of that device here. See DOD Br. at 7-8.

The Court's polling directive is also inconsistent with the categorical approach endorsed by the Supreme Court in United States Department of Justice v. Reporters Committee for Freedom of the Press, 109 S. Ct. 1468 (1989), and other cases. See DOD Br. at 5-6. AP cites a footnote in United States Department of State v. Ray, 502 U.S. 164, 176 n.12 (1991), as support for the proposition that "any balancing should be done on a case-by-case basis, not categorically," AP Br. at 7. But the Court in Ray in fact employed a categorical approach in upholding the government's redaction of names and other identifying information regarding Haitian returnees under Exemption 6. See Ray, 502 U.S. at 175-77 (analyzing privacy interests of returnees as a group, rather than individually). This case presents the same kinds of privacy interests that the Court categorically determined could be withheld in Ray. See id.; Defendant's Memorandum of Law in Support of Its Motion for Summary Judgment ("DOD SJ Br.") at 13,

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[2] The Court cites Rules 56(f), 43(e), and 83(b) of the Federal Rules of Civil Procedure as support for its polling order. See Order at 3-4. The Federal Rules of Civil Procedure do not provide any waiver of sovereign immunity. United States v. Sherwood, 312 U.S. 584, 589-90 (1941); see also Rules Enabling Act, 28 U.S.C. § 2072(b) (rules "shall not abridge, enlarge or modify any substantive right"); Fed. R. Civ. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . .").

15-16.

Contrary to AP's argument, AP Br. at 7, moreover, the fact that DOD released the names and other identifying information of detainees who had filed habeas petitions does not suggest that a categorical approach is inappropriate under FOIA. Those detainees are not similarly situated to the detainees whose personal information was redacted. The habeas petitioners, as a group, no longer had any privacy interest in their names and other identifying information; they had put that information at issue (and thus waived any privacy interest) by filing their habeas petitions. The remaining detainees, by contrast, have a strong privacy interest, which is entitled to categorical protection under Exemption 6. See DOD SJ Br. at 13-19.

AP's claim that "there is reason to doubt the government's privacy analysis," based on two news reports of a hunger strike by detainees at Guantanamo, AP Br. at 5-6, is also wrong. That certain detainees have mounted a hunger strike -- whether "to call public attention to their confinement," as AP speculates, or for some other reason -- says nothing about whether the detainees wish to publicly associate their names with the evidence they gave to the United States Government in connection with the Combatant Status Review Tribunals. If anything, the hunger strike underscores the material logistical difficulties associated with complying with the Order and the minimal likelihood of obtaining meaningful, informed consent from the detainees. See Second Supplemental Declaration of Karen L. Hecker ("Second Supp. Hecker Decl.") ¶¶ 2-13. With respect to the question of informed consent, Justice Breyer has aptly observed in the context of constitutional privacy:

> It is tempting to think we can resolve these dilemmas simply by requiring that an individual whose privacy is threatened be informed and grant consent. But an "informed consent" requirement does not necessarily work. Consent forms can be

> signed without understanding. And, in any event, a decision by one individual to release information or to keep it confidential often affects the lives of others.

Associate Justice Stephen Breyer, "Our Democratic Constitution," Harvard University Tanner Lectures on Human Values (Nov. 17-19, 2004) (available at http://www.supremecourtus.gov/publicinfo/speeches/sp_11-17-04.html).

B. The Order Infringes on Principles of Separation of Powers and Judicial Deference to the Executive in Operational Military Matters

AP similarly fails to counter DOD's arguments that the Order contravenes principles of separation of powers and judicial deference to military determinations, and thus raises substantial constitutional concerns. AP's reasoning that the Government's separation of powers argument is inconsistent with Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), AP Br. at 8, is seriously flawed. As a threshold matter, AP misperceives the holding in Hamdi. Contrary to AP's suggestion, AP Br. at 8, the Supreme Court did not recognize a due process right for the detainees at Guantanamo. The petitioner in Hamdi was an American citizen detained as an enemy combatant within the United States; the detainees at Guantanamo are alien enemy combatants detained on foreign soil. While Rasul v. Bush, 124 S. Ct. 2686 (2004), did address the rights of Guantanamo detainees, that case held only that Congress had provided habeas jurisdiction as a statutory matter; the Supreme Court expressly declined to reach the merits of the detainees' habeas petitions. See 124 S. Ct. at 2699 ("Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now.").[3]

[3] The district courts are divided as to whether Guantanamo detainees possess due process rights. Compare Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (Leon, J.) with In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) (Green, J.). A consolidated

AP also mischaracterizes the plurality opinion in Hamdi as "'reject[ing] the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts' concerning the detainees." AP Br. at 8 (quoting Hamdi, 124 S. Ct. at 2650) (emphasis added). In fact, Hamdi's rejection of the Government's separation of powers argument was expressly limited to the circumstances of that case, which involved "a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator." Hamdi, 124 S. Ct. at 2650.[4] Whatever the scope of the Guantanamo detainees' right to contest their enemy combatant classifications, they plainly do not have a right to be consulted by DOD under Exemption 6 of FOIA. See DOD Letter Brief dated August 12, 2005, at 2 (collecting cases). Hamdi therefore provides no basis for this Court to disregard the separation of powers concerns presented by the Order, nor to reject the Executive Branch's considered judgment that compliance with the Order would create "intolerable" burdens on DOD's operational mission at Guantanamo, Second Supp. Hecker Decl. ¶ 2. On the contrary, Hamdi acknowledged "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United

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appeal of these cases is currently pending before the D.C. Circuit.

[4] Abu Ali v. Ashcroft, 350 F. Supp. 2d 28 (D.D.C. 2004) (Bates, J.), see AP Br. at 9, is inapposite for the same reason. See 350 F. Supp. 2d at 64 (concluding that "[t]he separation of powers cannot eliminate entirely . . . the right of a citizen to challenge his allegedly unlawful detention at the direction of the executive," while acknowledging that "[t]he deference due the executive in the management of foreign relations will limit any discovery that will occur and will narrow the court's inquiry"); cf. also Al-Anazi v. Bush, 370 F. Supp. 2d 188, 197 n.9 (D.D.C. 2005) (Bates, J.) (noting that unlike the Guantanamo detainee in Al-Anazi, the detainee in Abu Ali "was a United States citizen, a fact that figured prominently in the reasoning of that case"). United States v. Karake, 281 F. Supp. 2d 302 (D.D.C. 2003), also cited by AP, see AP Br. at 9, did not address either separation of powers or judicial deference to the executive in operational military matters.

States," and expressly noted "the reluctance of the courts 'to intrude upon the authority of the Executive in military and national security affairs'" Hamdi, 124 S. Ct. at 2647 (quoting Department of the Navy v. Egan, 484 U.S. 518, 530 (1988)); see also Padilla v. Hanft, __ F.3d __, 2005 WL 2175946, at *5 (4th Cir. Sept. 9, 2005) (detention of enemy combatant "unquestionably authorized by [Congress's Authorization for Use of Military Force Joint Resolution] as a fundamental incident to the President's prosecution of the war against al Qaeda in Afghanistan"). These same considerations counsel strongly in favor of reconsideration and vacatur of the Order in this case.

AP's attempt to avoid the separation of powers issue by characterizing the Order as a "litigation disclosure order," rather than "an effort to direct DOD in its control over the detainees," AP Br. at 8-9, is unconvincing. The Order does not require disclosure of the redacted information, as FOIA contemplates. See 5 U.S.C. § 552(a)(4)(B). Instead, the Order imposes a mandatory polling requirement, which has no statutory basis, necessarily intrudes on the military relationship between DOD and its captured enemy, and imposes concrete and significant burdens on DOD's operational mission. See DOD Br. at 3-12. AP's bald assertion that separation of powers and operational military concerns "can be alleviated by directing DOD to permit a third-party [such as the International Committee of the Red Cross or AP itself] to seek privacy waivers from the detainees, rather than requir[ing] DOD to query them," AP Br. at 10, does nothing to cure the defects in the Order. That DOD voluntarily "permits" representatives of the International Committee of the Red Cross to have access to the detainees under limited circumstances, AP Br. at 10 (citing DOD News Release No. 592-05 (June 12, 2005)), provides no authority for the Court to compel DOD to grant a news organization or any other third party access to the detainees for purposes of gathering evidence in a private lawsuit. Such an order would present equal, if not greater, separation of powers and operational concerns. Under either scenario, it is an improper encroachment on the executive function for a court to interfere in the handling of enemy prisoners during a time of war and to impose a mandatory polling requirement that is not contemplated by FOIA.

CONCLUSION

For the foregoing reasons, and the reasons stated in DOD's opening memorandum of law in support of its motion for reconsideration, the Court should grant reconsideration and vacate the August 29, 2005 order.

Dated: New York, New York
September 16, 2005

Respectfully submitted,

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: s/ Sarah S. Normand
ELIZABETH WOLSTEIN (EW-5194)
SARAH S. NORMAND (SN-2834)
Assistant United States Attorneys
86 Chambers Street
New York, New York 10007
Telephone: (212) 637-2743/2709
Facsimile: (212) 637-2686